UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARRIN LAPINE,

      Plaintiff,

                                              Case No. 1:22-cv-676

v.

                                              HON. JANE M. BECKERING

ROBERT LINCOLN, et al.,

      Defendants.
_____/

MEMORANDUM OPINION AND ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Defendant Corrections Officer (CO) Unknown/Dave Kerr filed a motion for partial summary judgment for failure to exhaust administrative remedies as to Count 15 of Plaintiff's Complaint. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R), recommending this Court grant Defendant's motion. The matter is presently before the Court on Plaintiff's two objections to the Report and Recommendation. Defendant filed a response in opposition. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff first objects to the Magistrate Judge's determination that the Prison Litigation Reform Act (PLRA) applies to the instant action, because while Plaintiff is no longer incarcerated, he was incarcerated at the time he initiated this case (Pl. Obj., ECF No. 74 at PageID.656; *see* R&R, ECF No. 73 at PageID.647 n.1, 649 n.3). Plaintiff's objection fails to demonstrate—let

alone identify—any factual or legal error in the Magistrate Judge's conclusion and is properly denied.

Plaintiff next objects to the Magistrate Judge's determination that he failed to exhaust his administrative remedies. Plaintiff reiterates his arguments that he was on "modified access to the grievance procedure at all relevant times", that he "requested a grievance" form against CO Kerr but "[n]o response was made", and that "[r]equests for other grievances were made and not responded to" (Pl. Obj., ECF No. 74 at PageID.656). Plaintiff's objection fails to demonstrate any factual or legal error in the Magistrate Judge's conclusions that Plaintiff failed to present evidence "that he was on modified grievance access" and that Plaintiff's statement "that he 'attempted' to filed a grievance" was insufficient "to create a genuine dispute on the question [of] whether Plaintiff exhausted the claim in question" (*see* R&R, ECF No. 73 at PageID.653–654). Further, even assuming that Plaintiff's 2016 kite attached to his objection (ECF No. 74-1 at PageID.660) is properly before this Court[1], without additional factual context the kite and Plaintiff's conclusory statements do not create a question of fact as to whether Plaintiff exhausted his claim against CO Kerr. Plaintiff's second objection is properly denied.

Accordingly, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court. Because this action was filed *in forma pauperis*, this Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal of this decision would not be taken in good faith. *See McGore v. Wrigglesworth*, 114 F.3d 601, 610 (6th Cir. 1997), overruled on other grounds by *Jones v. Bock*, 549 U.S. 199, 206, 211–12 (2007).

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[1] Defendant correctly argues in response that the 2016 kite submitted by Plaintiff is improper as it was not provided to the Magistrate Judge in response to Defendant's motion for summary judgment and that the kite is insufficient because it "does not bear any indication that it was received" by the Michigan Department of Corrections (*see* Resp., ECF No. 75 at PageID.661–662).

Therefore:

IT IS HEREBY ORDERED that the Objections (ECF No. 74) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 73) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 68) is GRANTED.

IT IS FURTHER ORDERED that this Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of this decision would not be taken in good faith.

Dated: May 3, 2023   /s/ Jane M. Beckering
                                                                      JANE M. BECKERING
                                                                      United States District Judge